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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)	
Petition to Amend Rule 37,)	Supreme Court
Rules of the Supreme Court of)	No. R-_____
Arizona)	
)	
)	
_____)	

Under Rule 28 of the Rules of the Supreme Court, Deans Douglas Sylvester and Marc Miller respectfully petition this court to adopt the proposed amendment to Rule 37 of the Rules of the Supreme Court to allow law schools to receive detailed information about how their respective students performed on the bar exam. The purpose of this proposed amendment is to provide information to schools that will enable them to better

prepare students to take and pass the bar exam.

I. Background and Purpose of the Proposed Rule Amendment

Rule 37 currently permits the court to “report to the law school from which the applicant graduated the applicant's status as pass, fail, or withdrew from examination” on the state bar exam. In contrast, many other states provide student-specific information, breaking down how each graduate did on each part of that state’s bar exam. Such information is extremely valuable because it allows law schools to perform statistical analyses that (1) predict which students are most likely to need interventions and additional help, (2) correlate students’ law school experiences with their performance on the bar, and (3) determine which interventions have the greatest impact for the particular parts of the bar exam that are problematic for students. Simply put, the more data law schools can collect about how specific students perform on the various sections of the bar exam, the better able the schools will be to prepare students to succeed on the bar exam and beyond.

The law schools understand that bar pass information—and more particularly, bar fail information—is sensitive and potentially embarrassing for applicants. There is a genuine privacy interest at stake. Notably, however, the fact of bar failure is already disclosed to the schools under the current rules, and the schools protect that sensitive information with all due care. Providing more granular data, including applicants’ scores on subparts, does not substantially increase the privacy risk for applicants, but it does

have great value for law schools seeking to improve their programs and increase the chances of all Arizona students passing the bar going forward.

The two state law schools approached the director of the Certification and Licensing Division of the Administrative Office of the Courts to determine whether it might be possible to receive the same kind of information other states provide regarding students who have taken the Arizona bar exam, which the Division previously provided as recently as 2005. The director informed the schools that, under the current rule, it may be possible to provide anonymized aggregate statistical information to the law schools, but that the Division would not provide applicant-specific information, even if the schools were to obtain waivers from applicants authorizing the release of such information to them. Anonymized, aggregate statistical information is helpful, but applicant-specific information would be far more valuable to the schools' ongoing efforts to prepare their students for the bar exam and to give them the best opportunity to pass. Such individualized performance data allows law schools to retrospectively link those outcomes to their own data (e.g., participation in school bar prep classes, or particular curricular pathways) to understand their impact and value.

Petitioners have surveyed all fifty states to determine what information they provide and how they manage the process. Some states provide detailed individual information to schools, others provide only limited or anonymized information. Some require consent from each student; others make release a condition of taking the bar.

Some, like Arizona, provide only gross data.

A number of states permit disclosure of student-identified information to law schools without requiring the applicant's consent. For instance, the North Dakota rules provide that:

(G.) The Board may release the same score information provided to a failing applicant, and the MBE and UBE scores for all other applicants, to the law school from which the applicant received a juris doctor degree. The report to a law school may use the name of the applicant.

North Dakota Admission to Practice Rules, Rule 13. Public Records. Minnesota also permits the disclosure of such information:

(6) Release of Examination Scores to Law Schools. At the discretion of the Board, the examination scores of an examinee may be released to the law school from which the examinee graduated.

Minnesota State Board of Law Examiners: Rules for Admission to the Bar, Rule 14. Confidentiality and Release of Information.

The rules in South Carolina provide for the release of such data and impose a confidentiality requirement on law schools that receive the data:

Beginning with the results of the February 2017 examination, the Clerk of the Supreme Court may release the following information to a law school regarding a graduate of that law school who has taken the UBE in South Carolina: the name of the graduate, the UBE and scaled MBE scores the graduate received, and the number of times the graduate has taken a bar examination in South Carolina. Any information released to law schools pursuant to this rule shall be kept confidential by the law school, shall only be used for statistical analysis, and shall only be released for purposes of reporting aggregated information to accrediting bodies. Each law school requesting the release of the above information shall, on a form approved by the Supreme Court, agree to comply with the confidentiality and use

restrictions placed on this information.

South Carolina Judicial Department Admission to Practice Law Rule 402(m)
Confidentiality and Release of Information.

A number of other states disclose detailed individual-identified information to law schools if the applicant consents. For instance, California's rule permits disclosure and mandates that consent be obtained as part of the bar application:

Beginning with the release of results from the July 2018 bar examination, the information provided to a law school shall also include the bar examination results of the law school's graduates allocated to the law school and the scores of any graduate allocated to the law school who did not pass the bar examination and who consents to the release of his or her scores to the law school. Consent of a law school graduate to the release of his or her scores may be obtained by a check-off on the graduate's application to take the bar examination. For purposes of this paragraph, "scores" means the same scores reported to a graduate who did not successfully pass the bar examination.

California Business and Professions Code §6060.25(b)(3). New York's rule is unclear, but we have confirmed that they too provide this information and obtains consent as part of the application process. New York's application contains a concise explanation of why this information is sought and how it will be used and requires applicants to opt in or out.

Missouri similarly permits the disclosure of information with consent, though without specifying how that consent is obtained.

Scores of an applicant on the bar examination will not be disclosed to the public, except that the board is authorized to: (a) Make public statistical results of the examination; and (b) Disclose to the law school from which an applicant graduated the applicant's grades, provided the applicant has signed a release form authorizing the board to do so; (c) Disclose to the law school

from which an applicant graduated the applicant's pass/fail status;...

Regulations of Board of Law Examiners: 8(b) & (c). See also Rules Governing the Admission to the Practice of Law in the State of North Carolina Section .100 Review of Written Bar Examination (.1003 Release of Scores: “Scores will be shared with the applicant's law school only with the applicant’s consent.”)

A number of states provide detailed anonymized information, as the director of the Certification and Licensing Division of the Administrative Office of the Courts indicated Arizona would be willing to do going forward. *See, e.g.*, Tennessee Supreme Court Rule 7, Sec. 12.11 (“Statistical information not identified with any particular applicant and information relating to whether and when an applicant has been admitted may be released to any person.”). A few states provide only the limited information Arizona has provided of late.

II. Contents of the Proposed Rule Amendments

Petitioners believe that the best approach would be for the rule to specify precisely what information is required to be disclosed, forego individualized consent, and impose confidentiality requirements upon law schools receiving such information. If the court adopts this approach, petitioners propose the following changes to the existing rule, reflected more fully in Appendix A.

3. shall report to the law school from which the applicant graduated the applicant's status as pass, fail, or withdrew from examination, as well as detailed information about how each applicant performed on each section of the bar exam, along with the overall median and standard deviations for each section. Any detailed information will be kept confidential and may be used

solely for scholarly research and monitoring and improving the school's educational and support programs; and

We do not believe that individualized applicant consent is necessary here, just as it is unnecessary for law schools to get individualized consent under current rules to receive pass/fail/withdraw results for each applicant. It is implicit in the very idea of enrolling in a law school that will eventually lead to a bar exam.

However, alternately, if the court were to require individualized consent before disclosure, petitioners ask that such consent be obtained as part of the application process, similar to what California and New York now do. Moreover, we believe that an opt-out approach is appropriate given the small risks and large benefits of facilitating disclosure. Under such an approach, petitioners propose the following language, reflected more fully in Appendix B.

3. shall report to the law school from which the applicant graduated the overall median and standard deviations for each section, each applicant's status as pass, fail, or withdrew from examination, and unless the applicant specifically objects, also detailed information about how the applicant performed on the different sections of the bar exam. An applicant may object to his or her law school receiving such identified granular data by checking a box on the graduate's application to take the bar examination. Any information provided will be kept confidential and may be used solely for scholarly research and monitoring and improving the school's educational and student support programs; and

Petitioners stand ready to work with the court and its staff to develop the precise language to be used for applicants to register objections, should that be deemed necessary. Alternately, outside the bar application, the law schools would be willing to seek consent and convey such consent to the court. However, this approach will add additional steps

to the process, which could lead to mistakes or other problems.

The petitioners strongly recommend that the Court adopt our primary proposal, as reflected in Appendix A, because it both simple and maximizes our ability to serve our students and drive success on the bar exam. In case the court nonetheless believes that some form of consent is necessary, we offer Appendix B as an alternative.

V. Conclusion

The proposed rule will provide law schools with critical data that they can use to help students prepare for and pass the bar exam. Accordingly, Deans Douglas Sylvester and Marc Miller respectfully request that this court amend Rule 37 of the Arizona Rules of the Supreme Court as outlined above to permit disclosure to the law schools of detailed information regarding how their respective graduates performed on the Arizona bar exam, provided their graduates provide consent.

Changes in Appendix A are reflected in legislative mark-up where additions are shown by underline and deletions are shown by ~~striketrough~~.

DATED this 9th day of January, 2019.

_____/s/ Douglas Sylvester_____
Douglas J. Sylvester, Dean
Sandra Day O'Connor College of Law
Arizona State University

/s/ Marc Miller
Marc L. Miller, Dean and Ralph W. Bilby Professor of Law
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APPENDIX A: TEXT OF PROPOSED RULE CHANGE

RULES OF THE SUPREME COURT OF ARIZONA

Rule 37. Miscellaneous Provisions Relating to Admissions

(a)–(b) No Change

(c) Retention and Confidentiality of Records of Applicants for Admission. The records of applicants for admission to the practice of law shall be maintained and may be destroyed in accordance with approved retention and disposition schedules pursuant to administrative order of the Court, pursuant to Rule 29, Rules of the Supreme Court. The records and the proceedings concerning an application for admission shall remain confidential, except as otherwise provided in these rules. Bar counsel shall be allowed access to the records of applicants for admission and the proceedings of the Committee concerning an application for admission in connection with the duties set forth in Rule 36(a)(2)(C). In addition, the Committee on Character and Fitness and the Committee on Examinations, or the Committees' designated staff, ~~may~~

1. may disclose their respective records pertaining to an applicant to
 - A. the National Conference of Bar Examiners;
 - B. the admitting authority of any other state to which the applicant seeks admission;
 - C. an attorney discipline enforcement agency;
 - D. an agency authorized to investigate the qualifications of judicial candidates;
 - E. a law enforcement agency, upon subpoena or good cause shown; or
 - F. other court agencies, court committees or regulatory boards, for good cause shown;
2. may publicly announce the names of the applicants who have successfully completed the examination;
3. shall report to the law school from which the applicant graduated the applicant's status as pass, fail, or withdrew from examination, as well as detailed information about how each applicant performed on the different sections of the bar exam, along with the overall median and standard deviations for each section. Any detailed information will be kept confidential and may be used solely for scholarly research and monitoring and improving the school's educational and student support programs; and
4. disclose to an applicant, as required by paragraphs (e) and (f) of this rule, evidence to be used at the hearing.

(d)–(e) No Change

APPENDIX B: TEXT OF ALTERNATIVE PROPOSED RULE CHANGE

RULES OF THE SUPREME COURT OF ARIZONA

Rule 37. Miscellaneous Provisions Relating to Admissions

(a)–(b) No Change

(c) Retention and Confidentiality of Records of Applicants for Admission. The records of applicants for admission to the practice of law shall be maintained and may be destroyed in accordance with approved retention and disposition schedules pursuant to administrative order of the Court, pursuant to Rule 29, Rules of the Supreme Court. The records and the proceedings concerning an application for admission shall remain confidential, except as otherwise provided in these rules. Bar counsel shall be allowed access to the records of applicants for admission and the proceedings of the Committee concerning an application for admission in connection with the duties set forth in Rule 36(a)(2)(C). In addition, the Committee on Character and Fitness and the Committee on Examinations, or the Committees' designated staff, ~~may~~

1. may disclose their respective records pertaining to an applicant to
 - A. the National Conference of Bar Examiners;
 - B. the admitting authority of any other state to which the applicant seeks admission;
 - C. an attorney discipline enforcement agency;
 - D. an agency authorized to investigate the qualifications of judicial candidates;
 - E. a law enforcement agency, upon subpoena or good cause shown; or
 - F. other court agencies, court committees or regulatory boards, for good cause shown;
2. may publicly announce the names of the applicants who have successfully completed the examination;
3. shall report to the law school from which the applicant graduated the overall median and standard deviations for each section, each applicant's status as pass, fail, or withdrew from examination, and unless the applicant specifically objects, also detailed information about how the applicant performed on the different sections of the bar exam. An applicant may object to his or her law school receiving such identified granular data by checking a box on the graduate's application to take the bar examination. Any information provided will be kept confidential and may be used solely for scholarly research and monitoring and improving the school's educational and student support programs; and
4. disclose to an applicant, as required by paragraphs (e) and (f) of this rule, evidence to be used at the hearing.

(d)–(e) No Change